

## **REMARKS**

In response to the above-identified Office Action, the Applicants amend the application and seek reconsideration thereof. No claims have been added or cancelled. Claims 1, 24 and 30 have been amended. Accordingly, claims 1-4, 6, 11, 16, 17 and 24-34 remain pending in the application.

### **I. Interview Summary**

An Examiner Interview was conducted on April 5, 2007 with Applicants' attorneys, Thomas Coester and Jonathan Miller, participating. The Examiner's review of the previously submitted Declaration under 37 C.F.R. § 1.132 was discussed including possible methods for altering and augmenting the Declaration to improve its persuasiveness. No agreements were reached. The Examiner indicated that the Declaration would be reconsidered if the Applicants clarified the nexus between the supporting declarations from the Applicants' clients and the claimed invention, such as amending the independent claims to explicitly recite a web browser. The Examiner also indicated that the Declaration would be reconsidered if further evidence in support of the claims of copying were provided and if case law was provided in support of the position that the Applicants' product did not have to be commensurate in scope to the claims and that success as a new entrant to a market was evidence in support of secondary considerations of commercial success. The Applicants have endeavored to provide herewith the discussed evidence and support and request that the Examiner give it consideration in conjunction with a revised Declaration from Milford Skane.

## **II. Claims Rejection Under 35 U.S.C. §103**

Claims 1-3, 6, 16, 17 and 24-34 stand rejected under 35 U.S.C. § 103 as allegedly being unpatentable over U.S. Patent No. 5,797,126 issued to Helbling et al. (hereinafter “Helbling”) in view of U.S. Patent No. 6,223,166 issued to Kay (hereinafter “Kay”).

The Applicants submit herewith a Declaration under 37 CFR § 1.132 in order to rebut the Examiner’s *prima facie* case of obviousness. A new Declaration from Milford Skane, CEO of MS Intergate, Inc., the assignee of the present application, is submitted herewith and asserts that the commercial success and copying of the product of the assignee, which embodies all of the elements of the present claims, are evidence that the claims are not obvious over Helbling in view of Kay. See MPEP § 716.03 and 716.06. The Applicants submit that the new Declaration supports the assertion that it is not obvious to modify Helbling to be used in a wide area network context and further that it is not obvious to modify Helbling to provide information through a client node that is unaffiliated with the server and has no dedicated resident software, as recited in the amended independent claims.

The new Declaration of Milford Skane sets forth that the product of the assignee corresponds in scope to the claims. The Applicants also believe that the Examiner’s reliance on *In re Tiffin and Erdman*, 171 USPQ 294 (CCPA 1971) for finding that the scope of the claims must be commensurate with the commercial product of the Applicants is inapposite. The Applicants refer the Examiner to a more current statement on this issue from the Federal Circuit in *Applied Materials Inc. v. Advanced Semiconductor Materials*, 40 USPQ2d 1481 (Fed. Cir. 1996). In this case, Advanced Semiconductor Materials (ASM) challenged “the evidentiary value of the objective evidence of commercial success on

the added ground that the claims are broader than Applied Materials' successful commercial embodiment." *Id.* at 1486. In response to this challenge, the Court stated "a patentee need not show that all possible embodiments within the claims were successfully commercialized in order to rely on the success in the marketplace of the embodiment that was commercialized." In regard to the present application, the Applicants have shown that the embodiment of the claims related to the use of a web browser for selecting individual tickets has been successful and need not show that other embodiments were commercially successful to establish commercial success as a secondary consideration.

Claim 24 has been amended to be directed to the use of a web browser. In regard to claim 24, the Examiner's position is moot as the claim language is commensurate with the commercialized embodiment of the invention in the form of CyberSEATS™ referenced in the new Declaration of Milford Skane and the supporting declarations. The product, CyberSEATS™ was commercially successful prior to the copying of the claimed features by the competitors of the assignee. Commercial success was directly tied to the claimed elements. Therefore, the Applicants believe the requisite nexus between the CyberSEATS™ product and the claimed invention exists. Accordingly, the Applicants respectfully request that the Examiner reconsider this aspect of the Declaration.

The new Declaration of Milford Skane is accompanied by exhibits that constitute actual proof and that are of direct probative value to the non-obviousness of the claimed invention and thus rebut the *prima facie* case of obviousness. The accompanying objective evidence includes a sales chart showing the ticket sales generated through the assignee's product and a chart showing the number of clients contracting for the CyberSEATS™ product over this time period. A set of supporting Declarations from customers of the assignee establishing that the assignee's product, CyberSEATS™, was commercially successful *because of the claimed elements* of the present application is also resubmitted

with the new Declaration. These supporting declarations are of probative value as evidence, as is clearly set forth in *Ex parte Anderson*, 21 USPQ 2d 1241, 1262 (BPAI 1991). In addition, the Applicants request that the Examiner consider *Pro-Mold and Tool Co. v. Great Lakes Plastics Inc.*, 37 USPQ2d 1626 (Fed. Cir. 1996) in which the Court stated that “Pro-Mold’s lack of previous experience in the relevant market combined with its high sales of the patented product provided an inference of a nexus between its commercial success and the patented invention and are thus probative evidence of non-obviousness.” *Pro-Mold and Tool Co. v. Great Lakes Plastics Inc.*, at 1630. Further, the Court states that Pro-Mold’s “lack of market power in this field would seem to suggest that it was the features of the patented invention that led to the commercial success.” *Id.* At 1630. The Applicants believe that the facts of their case are analogous to that of Pro-Mold’s case. MS Intergate was a new market entrant with the CyberSEATS™ product and did not have any market power at the time it was introduced. Thus, the success of MS Intergate with CyberSEATS™ is tied to the claimed features of CyberSEATS™ and therefore probative of the non-obviousness of the claimed invention.

The Applicants provide additional evidence in support of the assertion that competitors have copied the claimed invention. The evidence is in the form of screenshots of competitors products that demonstrate that each of the elements of the independent claims have been copied. Each of the competing websites is available over the Internet and provides an interface that allows for the selection of individual seats through a web browser that can be purchased. Therefore, the Applicants believe that the submitted evidence establishes the commercial success and the copying of CyberSEATS™ and rebuts the *prima facie* case of obviousness for the pending claims.

When analyzing the Declaration for overcoming the *prima facie* case of obviousness the Applicants direct the Examiner’s attention to *Demarco Corp. v. F. Von Langsdorff Licensing Ltd.*, 7

USPQ2d 1222 (Fed. Cir. 1988), which sets forth that it is not required to prove as part of establishing commercial success that the commercial success “is *not* due to factors other than the patented invention.” See *Demarco* at 1227. The Court further states that a “requirement for proof of the negative of all imaginable contributing factors would be unfairly burdensome, and contrary to the ordinary rules of Evidence.” *Id.* at 1227. The Applicants request that the Examiner take these points into consideration when weighing the probative value of the evidence supplied in relation to the *prima facie* case of obviousness. Accordingly, reconsideration and withdrawal of the obviousness rejection of claims 1-3, 6, 16, 17 and 23-24 are requested.

Claims 4 and 11 stand rejected under 35 U.S.C. § 103 as being unpatentable over Helbling in view of Kay and in further view of U.S. Patent No. 5,897,620 issued to Walker et al (hereinafter “Walker”) or in view of U.S. Patent No. 6,301,574 issued to Thomas et al. (hereinafter “Thomas”). These claims depend from independent claim 1 and the Applicants believe that these claims also are not obvious for the reasons set forth in regard to independent claim 1. Accordingly, reconsideration and withdrawal of the obviousness rejection of these claims is requested.

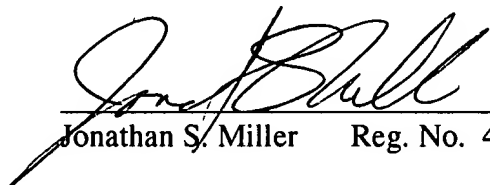
**CONCLUSION**

In view of the forgoing, it is believed that all claims now pending are in condition for allowance and such action is earnestly solicited at the earliest possible date. If there are any additional fees due in connection with the filing of this response, please charge those fees to our Deposit Account No. 02-2666. Questions regarding this matter should be directed to the undersigned at (310) 207-3800.

Respectfully submitted,

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Dated: 4/30, 2007

  
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